IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF EASTERN PENNSYLVANIA

SHERIE SINGLETARY DATIS	:	
	:	CIVIL ACTION
v.	:	
	:	No. 96-6969
OFFICE OF THE ATTORNEY GENERAL	:	
OF THE COMMONWEALTH OF PENNSYLVANIA,	:	
Bureau of Narcotics Investigation & Drug Control	:	

O'Neill, J. January 16, 1997

M E M O R A N D U M

Plaintiff Sherie Singletary Datis brings this action against her employer, Office of the Attorney General of the Commonwealth of Pennsylvania, Bureau of Narcotics Investigation & Drug Control (BNI), alleging that she was subjected to sex discrimination, sexual harassment, and retaliation in violation of Title VII, 42 U.S.C. §§ 2000e-2 and 2000e-3. She also asserts various state law claims. Presently before me is defendant's motion for partial summary judgment on the Title VII claims. For the reasons set forth below, defendant's motion will be GRANTED in part and DENIED in part.

Introduction[1]

Plaintiff began working in 1986 with the Bureau of Narcotics Investigation and Drug

[1] The following facts are derived from the record and presented in the light most favorable to plaintiff.

Control (BNI) of defendant Office of the Attorney General (OAG) in BNI's regional Allentown office. In January, 1994 she was promoted to Narcotics Agent III, a supervisory position in which she directed a squad of eight or nine other Agents, and began a mandatory 6 month probation under the supervision of Acting Regional Director David Farrelly. Farrelly had been transferred to oversee the Allentown office that same month. At the end of plaintiff's probationary period in July, 1994, Farrelly gave plaintiff her first-ever negative performance evaluation. Farrelly recommended that plaintiff's probation be extended by six months, but this was subsequently reduced to three months at the behest of Farrelly's supervisor, Assistant Deputy Director James Caggiano.

Plaintiff immediately protested the evaluation to Caggiano on grounds that it reflected gender bias against her. Plaintiff told Caggiano that Farrelly had led her to believe that she was doing a good job and had never told her that he had problems with her performance. She told him that Farrelly had a "problem with women" and treated women in his office, including herself, disparately. She detailed how her performance had been on par with or better than that of a male Narcotics III Agent who had been promoted and served probation at the same time as she, yet received a more positive evaluation and did not have his probation extended. In addition, she informed Caggiano of a "good old boys" atmosphere in the Allentown office that was hostile to women and specifically mentioned a "Wall of Shame" created under Farrelly's tenure depicting sexually explicit, offensive, and demeaning photographs and writings.

Plaintiff again discussed her complaints with Caggiano several weeks later and on August 31 reduced her complaints to a lengthy memo rebutting the negative evaluation point by point and further elaborating on the hostile environment in the office. On September 21, 1994,

plaintiff called Caggiano and told him that the atmosphere in the office was deteriorating, that she was experiencing physical illness as a result, and that she was considering seeking the advice of an attorney about her discrimination complaints. Caggiano immediately had Farrelly transferred out of the Allentown office.

In November 1994, during an interview concerning her discrimination complaints, plaintiff informed internal affairs investigator Luther Henry that over the course of the previous year she had been sexually propositioned by two male Agents. These claims were not investigated and no disciplinary action was taken against the Agents. On December 6, 1994, plaintiff filed an EEOC complaint alleging gender discrimination and sexual harassment. That same month (whether before or after plaintiff filed the EEOC complaint is unclear), the Wall of Shame was removed on Caggiano's order.

In addition to the gender discrimination and harassment described above, plaintiff has testified that she was subject to retaliation for her internal complaints and for filing the EEOC complaint. After Farrelly's negative evaluation in July, 1994 and her complaints about it, plaintiff was barred from some supervisory activities, such as serving as an instructor for training sessions. After plaintiff filed her internal complaint, Caggiano told plaintiff he would seek to have her probation extended indefinitely pending internal investigation because he believed that, should her claims prove false, she would not be suitable for the supervisory position of Narcotics III. Caggiano was subsequently informed by Bruce Sarteschi, Chief Personnel Director of the OAG, that probation could not be extended for that reason and plaintiff's probation actually ended in October, 1994. Caggiano did not so inform plaintiff, however, and she continued to believe for approximately a year that her probation had been extended indefinitely. Caggiano

also told her she was the "enemy" for filing her complaints. As a result of her belief that she remained on probation and because of the "problems" caused by her complaints of discrimination and Farrelly's negative evaluation, plaintiff believed she was not promotable and that it would be futile to seek promotion.

In addition, plaintiff has testified that supervisors failed to take any action in response to her complaints that she was being verbally harassed and defamed by other agents and placed Agents whom she had accused of sexual harassment on her squad over her protests. Upon her return from medical leave unrelated to her discrimination claims (approximately March, 1995 to October, 1995), she was assigned to desk duty for three weeks and did not regain all of her supervisory authority and responsibilities for field work until that December. Finally, she offers testimony that as a result of her complaints of the discriminatory conduct of defendant's agents, her career with defendant is effectively at an end.

I. Summary Judgment Standard

Summary judgment must be entered against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. V. Catrett, 477 U.S. 317, 322 (1986). To defeat a motion for summary judgment, the non-moving party must produce evidence of material facts sufficient to allow a reasonable jury to return a verdict in that party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986).

In deciding this motion, I must view the evidence and any reasonable inferences to be drawn therefrom in the light most favorable to the non-moving party. Clark v. Commonwealth

of Pennsylvania, 885 F. Supp. 694, 707 (E.D. Pa. 1995). In the context of a discrimination action such as this, moreover, "it is the totality of the evidence that must guide [my] analysis rather than the strength of each individual argument." Bray v. Mariott Hotels, 110 F.3d 986, 991 (3d Cir. 1997). "A play cannot be understood on the basis of some of its scenes but only on the entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario." Andrews v. City of Philadelphia, 895 F.2d 1469, 1484 (3d Cir. 1990).

II. Failure to Promote[2]

Defendant attacks the sufficiency of plaintiff's gender discrimination claims insofar as they arise from alleged failure to promote or damage to plaintiff's "promotability." To make a prima facie showing of failure to promote, a plaintiff ordinarily must establish that she (1) is a member of a protected class; (2) applied for position which was available and for which she was qualified; (3) was rejected; and (4) after the rejection, the employer held the position open and continued to seek applicants similarly qualified as plaintiff. Bray v. Mariott Hotels, 110 F.3d 986, 989-90 (3d Cir. 1997), citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Defendant asserts that plaintiff never sought promotion, that she was on medical leave when her fellow Narcotics Agent III, Kurt Montz, was promoted to Acting Regional Director, and that the record "does not establish that [plaintiff's] promotability was in jeopardy" because she continued to receive good performance evaluations containing no comments that would

[2] Plaintiff appears to seek damages for failure to promote and damage to her "promotability" under both her sex discrimination and retaliation claims. This analysis applies to both.

"affect her potential for promotion in the office." (Def. B. at 8-9.) Plaintiff counters that both she and one of her former supervisors have testified at deposition that plaintiff's career with defendant is effectively over due to her complaints of discrimination and retaliation. Plaintiff has also testified that she felt uncomfortable applying for a promotion due to the problems created by her complaints and management's failure to deal with them.

I conclude that plaintiff has not produced sufficient evidence to make out a prima facie case for failure to promote. In her deposition testimony, plaintiff states that she could not take advantage of promotional opportunities available in the years 1994 to 1996. However, she does not identify any specific, available position that she was denied or prevented from seeking. There is no evidence that she ever applied for a promotion, was considered by defendant on its own initiative for a promotion but rejected, or was told that she could not apply for promotion. Nor is there evidence that a Narcotics Agent III could ordinarily expect promotion as a matter of course. Finally, there is no evidence concerning whether plaintiff was qualified for whatever promotional opportunities may have been available.

There is some suggestion in plaintiff's brief and in her deposition testimony that defendant impeded plaintiff from applying for a promotion between October 1994 and October 1995 by leading her to believe that she continued to be on probation for this period, which in turn caused her to think it would have been futile to seek promotion. It is conceivable that in some circumstances such a claim might allow a plaintiff to pursue a failure to promote claim despite not having applied for a promotion (as if, for example, an employer falsely told an employee she was not qualified for and could not apply for an available position in which she had expressed interest). See Bray, 110 F.3d at 990, n.5 (noting flexibility of prima facie case requirements

depending on particular circumstances of each case). In this case, however, there is no evidence that plaintiff was not eligible to apply for a promotion while on probation or was led to believe she was not eligible. Indeed, plaintiff admitted at deposition that another Narcotics Agent III applied for a Narcotics Agent IV position despite, like plaintiff, having had his probation extended. Moreover, there remains a complete absence of evidence that during the period plaintiff believed she was on probation any particular position desired by plaintiff and for which she was qualified was available but filled by a member of a class not protected by Title VII. Given the absence of evidence supporting these central elements of her prima facie case, plaintiff's claim for failure to promote is based wholly on speculation. I conclude, therefore, that no such claim may be submitted to the jury and that plaintiff may not seek either front pay or back pay damages on the theory that she should have been promoted or that defendant has damaged her potential for future promotion.[3]

III. Hostile Work Environment

Plaintiff asserts in Count I of her complaint that the actions of defendant's agents subjected her to sex discrimination[4] and hostile work environment sexual harassment in violation of Title VII, which prohibits employers from discriminating "against any individual with respect

[3] Of course, plaintiff may seek damages for emotional suffering caused by her belief that defendant had impeded her promotional opportunities. She may also seek appropriate injunctive relief should the jury determine that defendant's discriminatory or retaliatory conduct has resulted in the inclusion of damaging material in plaintiff's personnel record.

[4] Defendant does not seek summary judgment on plaintiff's sex discrimination claims aside from those arising from alleged failure to promote and plaintiff may, of course, seek to recover damages for emotional and physical harm and/or special damages caused by the alleged discrimination.

to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a).

Plaintiff has alleged that she was subjected to a hostile environment by the maintenance of the Wall of Shame, by Farrelly's gender-based disparate treatment in his supervision of her and his promotion of a 'locker room" atmosphere in the office that excluded women, and by the sexual, verbal, and defamatory harassment by other Agents.[5] Defendant does not to challenge the sufficiency of plaintiff's claim concerning the "Wall of Shame" but, rather, argues that it cannot be held liable for the alleged harassment by Farrelly and other Agents.

To make out a prima facie case for hostile work environment harassment, plaintiff must show that (1) she was subjected to intentional discrimination on the basis of her gender; (2) the discrimination was pervasive and regular; (3) plaintiff was negatively affected by the discrimination; (4) a reasonable person in plaintiff's position would have been detrimentally affected; and (5) the employer is responsible for the discrimination under principles of respondeat superior liability. Andrews v. City of Philadelphia, 895 F.2d at 1482. Defendant argues that plaintiff has failed to produce evidence sufficient to support a finding of respondeat superior liability for the actions of Farrelly and other Agents.

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[5] While both parties frequently refer to plaintiffs claim as one for "sexual harassment," it is clear from both the pleadings and plaintiff's testimony that she is alleging a hostile work environment created only in part by harassment that was sexual in nature. As or more important to plaintiff's claim is alleged harassment based on plaintiff's gender or motivated by retaliation for her complaints. Harassment does not have to be sexual in nature to be actionable under Title VII if it is based on the victim's gender or reflects retaliatory motives. See Meritor Savings Bank, 477 U.S. 57, 65-66 (1986); Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990); Harley v. McCoach, 928 F. Supp. 533, 539-40 (E.D. Pa. 1996). The question is whether, looking at all circumstances, impermissibly-motivated harassment is "sufficiently severe or pervasive to alter the conditions of the victims's employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, 23 (1993) (quoting Meritor Savings Bank, 477 U.S. at 67).

The courts look to traditional agency principles in determining the liability of an employer for employee conduct that creates a hostile working environment. Meritor Savings Bank, 477 U.S. at 72; Bouton v. BMW of North America, Inc., 29 F.3d 103 (3d Cir. 1994). Employers may be held liable if (1) an employee commits a tort within the scope of his employment (i.e., has actual authority for his or her conduct) or, if the employee does not act within the scope of his employment, (2) the employer is negligent or reckless in failing to discipline, fire, or take remedial action upon notice of the harassment, or (3) the employee relies upon apparent authority or is aided by the agency relationship. Bouton, 29 F.3d at 106. Under (2), which both parties appear to assume is the only basis for liability applicable here, an employer will be found liable if it received notice of harassment but failed to take prompt and adequate remedial action. Andrews, 895 F.2d at 1486. Remedial action is adequate if it effectively stops the harassment or is "reasonably calculated" to do so. Knabe v. Boury Corp., 114 F.3d 407, 412 (3d Cir. 1997). Defendant asserts that it acted immediately and effectively to redress alleged harassment by Farrelly and other agents when informed of it, and therefore is insulated from liability. See Knabe v. Boury Corp., 114 F.3d 407, 411-413 (3d Cir. 1997). Plaintiff has testified, however, that on July 20, 1994 and in subsequent discussions the following weeks with Farrelly's supervisor, Caggiano, plaintiff complained both of Farrelly's alleged gender discrimination and of the offensive, hostile environment (including the maintenance of the Wall of Shame) in the Allentown office. Despite plaintiff's complaints, however, no action was taken against Farrelly until September 23, 1994, after plaintiff complained of physical illness and informed Caggiano that she was seeking legal counsel, and the Wall of Shame was not removed until December 1994. Plaintiff has also testified that no remedial action has been taken

in response to her complaints of continuing harassment by other Agents, of which defendant was clearly given notice by the filing of plaintiff's EEOC complaint, if not before. Plaintiff has thus created a genuine issue of fact as to whether defendant's remedial actions subsequent to July, 1994 were sufficiently prompt and "reasonably calculated to end further harassment" so as to insulate defendant from liability. Id.

Moreover, even without actual notice of harassment, an employer may be held liable for harassment of which it should have been aware or for failing to provide a "reasonable available avenue" of complaint. Meritor Savings Bank, 477 U.S. at 71; see also Cross v. State of Alabama, 49 F.3d 1490, 1506-1507 (11th Cir. 1995). Plaintiff has testified that prior to July 1994 she did register some complaints with Farrelly about the hostile environment in the office but kept most complaints to herself at least in part because, in light of Farrelly's toleration of the Wall of Shame and his promotion of a locker room atmosphere that excluded women, she concluded that complaining to Farrelly would be futile and likely create more problems for herself. She did not report her complaints to Farrelly's supervisors, she testifies, because her previous experiences of the grievance procedure led her to believe any complaints would be ignored or rebuffed. Plaintiff has thus produced a triable issue of fact as to whether defendant was negligent in failing to provide an effective avenue of complaint to plaintiff.

IV. Retaliation

In her second count, plaintiff asserts that defendant retaliated against her for complaining of and filing EEOC charges concerning the alleged sex discrimination and sexual harassment. Title VII provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

Plaintiff's retaliation claim is based on allegations that defendant's agents (1) led plaintiff to believe she was on indefinite probation; (2) allowed other Agents to continue harassing and demeaning her despite her complaints; (3) placed her on desk duty for three weeks and removed her supervisory duties for several months; (4) transferred two Agent about whom she had complained and whom supervisors knew to have antagonistic relationships with plaintiff to serve under her command; and (5) placed her in a position where her career with defendant is effectively over.

A. Exhaustion of Administrative Remedies

Defendant first argues that plaintiff has failed to exhaust her administrative remedies with regard to her retaliation claim as required in order to maintain a private action under Title VII. Defendant claims that the only alleged retaliatory act investigated by the EEOC was the extension of plaintiff's probation, and that this is therefore the only allegation upon which she is entitled to maintain a claim of retaliation in this suit. I disagree. Among the issues raised during the EEOC investigation were plaintiff's charges that her applications for training sessions were no longer approved, as they previously had been, after she filed her EEOC complaint (Pl. B., Ex. B. at ¶ 31), and that fellow male agents were "openly hostile" to her at a December 1994 staff meeting due to her involvement in having the Wall of Shame removed. Moreover, plaintiff

amended her EEOC charge to allege various sorts of retaliation:

> 32. Since the filing of her complaint with the Equal Employment Opportunity Commission [EEOC], Ms. Datis has been subject to harassing behavior and retaliatory behavior by her male peers and supervisors which continues to this day.
>
> 33. Since the filing of her complaint with the [EEOC], Ms. Datis has been subject to a hostile work environment which continues to this day.
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> 34. Since the filing of her complaint with the [EEOC], Ms. Datis has been denied field and supervisory assignments and been relegated to paper work and office work.

Contrary to defendant's assertion, then, the allegations of retaliation complained of in this action were within the scope of the EEOC charges as amended. Plaintiff was not, moreover, required to make a new EEOC charge every time a new act of retaliation occurred in order to maintain a subsequent civil action under Title VII for the retaliation. "Requiring a new EEOC filing for each and every discriminatory act would not serve the purposes of the statutory scheme where the latter discriminatory acts [fall] squarely within the scope of the earlier EEOC complaint or investigation." Antol v. Perry, 82 F.3d 1291, 1295 (3d Cir. 1996). In this case, allegations of retaliation not expressly covered by the EEOC charge clearly fall within its scope.

B. Plaintiff's Prima Facie Case of Retaliation

As with claims of sex discrimination, to prevail on a claim of retaliation in violation of Title VII the plaintiff must show that she was subjected to intentional discrimination pursuant to the analytical framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). To establish her prima facie case for retaliation, plaintiff must show that (1) she engaged in activity protected by Title VII; (2) the employer took "adverse employment action" against her; and (3) there was a causal

connection between the protected activity and the adverse action. Nelson v. Upsula College, 51 F.3d 383, 386 (3d Cir. 1995). If plaintiff succeeds in establishing her prima facie case, defendant must articulate a legitimate, nondiscriminatory reason for plaintiff's treatment, upon which plaintiff then has the opportunity to prove that the articulated reasons are pretextual or unworthy of credence.

As to the first prong of plaintiff's prima facie case, defendant appears to argue that plaintiff's internal complaints of sex discrimination and harassment were not protected activity, though it admits that her EEOC filing was protected. Title VII does not only protect complaints to the EEOC, however; it protects any opposition to discriminatory practices made unlawful under the act. Plaintiff's internal complaints of gender discrimination and harassment, as well as the filing of the EEOC complaint, were clearly protected activity. See Barber v. CSX Distribution Services, 68 F.3d 694, 701-702 (3d Cir. 1995).

Defendant next argues that plaintiff's allegations of retaliation do not amount to an "adverse employment action" within the meaning of Title VII's proscription on retaliation. See Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997). Plaintiff has, however, produced evidence that supervisors knowingly led her to believe her probation had been indefinitely extended as a result of her internal complaints of discrimination; that some of her supervisory activities were restricted as of July, 1994 and that all supervisory duties were removed and she was assigned to desk duty immediately following a return from medical leave; that internal investigations were launched against her as a result of her internal complaints; and that supervisors failed to address her complaints of the hostile environment created by other Agents who made demeaning and defamatory statements about her and placed two of these

Agents under her supervision despite her protests. While each of these actions, taken alone, might not be sufficient to constitute an adverse employment action, taken together they clearly could adversely affect plaintiff's "conditions or privileges of employment" or "status as an employee," 42 U.S.C. 2000e-2, and thus be found to constitute an adverse employment action. Robinson, 120 F.3d at 1300.

Finally, defendant asserts that plaintiff has produced no evidence of a causal link between the alleged retaliatory actions and her complaints of discrimination and harassment. I disagree. The deposition testimony of Caggiano and other evidence could reasonably support an inference that, while not necessarily bearing animosity toward plaintiff, he may have been impermissibly motivated against her due to her filing of complaints; defendant, indeed, states that Caggiano wished to extend her probation because he believed that if her claims proved false she "might not be a suitable supervisory example" who should be finally promoted to Narcotics III.[6] (Def. Statement of Material Facts, ¶¶ 31-32.) As to the internal investigations launched against plaintiff, their timing and evidence that the investigations were either unfounded or never resolved throws into doubt defendant's assertion that the investigations were legitimately motivated. Plaintiff has also testified that she was unaware of any other case other than her own in which an agent returning from medical leave was assigned to desk duty and lost his or her field work responsibilities. "[E]vidence of inconsistencies and implausibilities" in the reasons

[6] Employers may not discriminate against an employee for complaining of Title VII violations even if the charges are eventually found wanting, so long as the employee's complaints were reasonable. Collins v. State of Illinois, 830 F.2d 692, 702 (7th Cir. 1987). In this case, there is sufficient evidence that plaintiff was treated disparately and that she worked in an environment hostile to women to make her claim reasonable even if not ultimately successful. Moreover, by July 1994, according to plaintiff's testimony, Caggiano himself had reason to know of such evidence.

defendant asserts for its actions may reasonably "support an inference that the employer did not act for non-discriminatory reasons." Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 900 (3d Cir. 1987); see also Cuffy v. Texaco Refining & Marketing Co., 684 F. Supp. 87 (D. Del. 1988). Plaintiff has produced evidence sufficient to support such an inference.

I conclude, therefore, that plaintiff has produced sufficient evidence to allow a reasonable jury to find that she was subjected to retaliation and is entitled to damages for emotional and/or physical damages resulting therefrom. As previously set forth, however, she has failed to establish a prima facie case for failure to promote and may not pursue such a claim at trial.